

No. 15236

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United States  
Court of Appeals  
for the Ninth Circuit

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BURTON E. CARR and MARIE A. CARR,  
Appellants.

vs.

CITY OF ANCHORAGE, a Corporation,  
Appellee.

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Transcript of Record

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Appeal from the District Court for the District of Alaska  
Third Division

FILED  
DEC - 3 1956



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

BELL, SANDERS & TALLMAN, By  
JAMES K. TALLMAN,

Central Bldg.,  
Anchorage, Alaska,

For the Appellants.

JAMES M. FITZGERALD,

City Attorney;

L. EUGENE WILLIAMS,

City Hall,  
Anchorage, Alaska,

For the Appellee.





In the District Court for the District of Alaska,  
Third Division

No. A-11,887

BURTON E. CARR AND MARIE A. CARR,

Plaintiffs,

vs.

CITY OF ANCHORAGE, a Municipal Corpora-  
tion,

Defendant.

### COMPLAINT

Come now the above-named Plaintiffs and for their cause of action against the Defendant, allege and state as follows:

#### I.

That the City of Anchorage is a municipal corporation organized and existing under and by virtue of the laws of the Territory of Alaska and of the United States of America.

#### II.

That on or about the 15th day of May, 1950, these Plaintiffs owned a piece of property located at the corner of Fifth Avenue and Denali, which the legal description thereof was:

Lot One (1), Block Twenty (20), East Addition to the City of Anchorage, Alaska, according to the recorded plat thereof.

## III.

That on or about May 15, 1950, the Defendant, acting through its duly elected, qualified and acting counsel, in a regular meeting thereof, unanimously promised these Plaintiffs that if they would cut the foundation off on a building they were commencing to build and move the building back, they would pay the cost of cutting off the foundation and building it back farther on the lot so that the City could take ten feet of the front of said lot, by condemnation, for the purpose of widening the street, and for sidewalk purposes.

## IV.

That these Plaintiffs believed the counsel of the City of Anchorage, agreed with said City of Anchorage that they would cut their foundation off in front and extend it at the back, and relying thereon, did cut said foundation off in front and build the buildings back on said lot, twelve feet, and as a result thereof, they became obligated and bound to pay for the cutting off of said foundation and the extra work required to do so, to the extent of \$4,051.84. This sum being made up by an estimate which was furnished by Victor Gottberg and accepted by these Plaintiffs, whereby the cutting off of the foundation and rebuilding at the back would be performed for \$2,542.00. But, when the work was done it required the changing of the heating plant from the surface level of the building to a special place in the basement and as extra work these Plaintiffs paid the difference between \$2,542.00

and \$4,051.48 for the extra work and material required, which made a total cost paid of \$4,051.48.

V.

Plaintiffs further allege that the defendant has failed, neglected and refused to pay said sum or any part thereof and are therefore justly indebted to these Plaintiffs in the sum of \$4,051.48, together with interest thereon at the rate of 6% per annum from the 1st day of August, 1950, at the time the account became due and payable.

Wherefore, Plaintiffs pray judgment against the Defendant, City of Anchorage, a municipal corporation, for the sum of \$4,051.48, together with interest thereon at the rate of 6% per annum from the 1st day of August, 1950, and for costs of this action, including a reasonable sum as attorney's fees.

BELL, SANDERS & TALLMAN,

By /s/ BAILEY E. BELL,

Of Attorneys for Plaintiffs.

Duly verified.

[Endorsed]: Filed February 7, 1956.

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[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now the defendant, by and through its attorney, Lynn W. Kirkland, and moves this Honorable Court dismiss the above-entitled action on

the grounds and for the reason that the complaint on file herein does not state a claim upon which relief can be granted.

Dated at Anchorage, Alaska, the 5th day of March, 1956.

/s/ LYNN W. KIRKLAND,  
Attorney for the Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 5, 1956.

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[Title of District Court and Cause.]

#### HEARING ON MOTION TO DISMISS

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to wit:

Now at this time Hearing on Motion to Dismiss in cause No. A-11,887, entitled Burton E. Carr and Marie A. Carr, plaintiffs, versus City of Anchorage, a Municipal corporation, defendant, came on regularly before the Court, plaintiff represented by Bailey E. Bell, of counsel, defendant represented by L. W. Kirkland, City Attorney, the following proceedings were had, to wit:

Argument to the Court was had by L. W. Kirkland, for and in behalf of the defendant.

Argument to the Court was had by Bailey E. Bell, for and in behalf of the plaintiff.

Whereupon, Court having heard the arguments of respective counsel and being fully and duly advised in the premises, plaintiff given ten (10) days within which to file brief; defendant given ten (10) days thereafter within which to file answering brief.

Entered March 16, 1956.

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[Title of District Court and Cause.]

### ANSWER

Comes Now the defendant herein and answers the complaint on file as follows:

#### I.

The defendant admits each and every allegation contained in paragraph I of the plaintiff's complaint herein.

#### II.

The defendant is without sufficient information to answer paragraph II of the complaint on file herein, and therefore, on information and belief denies the allegations contained therein.

#### III.

The defendant denies each and every allegation contained in paragraphs III and IV of the plaintiffs' complaint.

For a First and Separate Defense Against the Plaintiffs Herein the Defendant Alleges as Follows:

I.

That the contract as alleged in the plaintiffs' complaint is beyond the scope of the power of this defendant to contract and, therefore, said contract is void and unenforceable.

For a Second and Separate Defense Against the Plaintiffs Herein the Defendant Alleges as Follows:

I.

That the contract as alleged in the plaintiffs' complaint was not entered into as provided by Section 105, Chapter 2 of the Anchorage General Code, which section requires all contracts to be approved by the City Council, signed by the Mayor or City Manager, attested to by the City Clerk, approved as to substance by the City Manager and approved as to form by the City Attorney, and therefore the alleged contract is void and unenforceable.

For a Third and Separate Defense Against the Plaintiffs Herein the Defendant Alleges as Follows:

I.

That there is no record in the minutes of the City Council meetings, as required by Section 16-1-63, ACLA 1949, whereby the City Council has obligated the City to pay the plaintiffs as alleged in



their complaint; therefore, this contract is void and unenforceable.

For a Fourth and Separate Defense Against the Plaintiffs Herein the Defendant Alleges as Follows:

I.

That there is no record in the minutes of the meetings of the City Council of any vote by said Council, as provided in Section 16-1-40, ACLA 1949, obligating the City to pay these plaintiffs as alleged in their complaint, and, therefore, said contract is unenforceable and void.

Wherefore, having answered the complaint of the plaintiffs filed herein, the defendant prays that the plaintiffs take nothing by virtue of the same and that the defendant be reimbursed for costs and expenses herein incurred, including reasonable attorney's fees, and for such other relief as the court may deem just and equitable in the premises.

/s/ LYNN W. KIRKLAND,

Attorney for the Defendant,  
City of Anchorage.

Receipt of copy acknowledged.

[Endorsed]: Filed April 12, 1956.

[Title of District Court and Cause.]

### MOTION TO STRIKE FROM ANSWER

Come Now the Plaintiffs, Burton E. Carr and Marie A. Carr, and move the Court to strike from the Answer of the Defendant the second and separate affirmative defense as well as the third and separate affirmative defense and the fourth and separate affirmative defense; for the reason that they are surplusage, prejudicial, and the allegations therein states no defense to the Plaintiff's cause of action.

BELL, SANDERS & TALLMAN,

By /s/ BAILEY E. BELL,

Of Attorneys for Plaintiff.

To comply with the rule of the Court, requiring the movant to state the reasons and grounds of their motion, we contend as follows:

That Section 105, Chapter 2 of the Anchorage General Code has no application at all here, and only provides one method and for one form of a contract, but has no effect on the oral contract sued on herein.

That the third and separate defense cannot be pleaded. The City Council cannot plead as a defense to the Plaintiffs' cause of action their failure to keep proper records, which they are required to do by law, and the failure so to do would not effect these Plaintiffs' right, and they would be estopped in pais from pleading this separate defense.



As to the fourth and separate defense, the same thing applies to it as does to the third separate defense.

Respectfully submitted,

BELL, SANDERS & TALLMAN,

By /s/ BAILEY E. BELL

Of Attorneys for the Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed April 18, 1956.

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[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY  
JUDGMENT

To: Bailey E. Bell of the firm of Bell, Sanders & Tallman, Attorneys for the Plaintiffs.

Please Take Notice that the undersigned will bring the attached Motion for Summary Judgment on for hearing before the Honorable J. L. McCarrey, Jr., in the Federal Building at Anchorage, Alaska, on the 4th day of May, 1956, at 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, and that this motion will be submitted upon the pleadings and admissions on file.

Dated at Anchorage, Alaska, the 11th day of April, 1956.

/s/ LYNN W. KIRKLAND,

Attorney for the Defendant,  
City of Anchorage.

[Title of District Court and Cause.]

### MOTION FOR SUMMARY JUDGMENT

The defendant, City of Anchorage, by and through its attorney, Lynn W. Kirkland, hereby moves this court to enter a summary judgment for the defendant in accordance with the provisions of Rule 56 (b) and (c), Federal Rules of Civil Procedure, on the ground that the pleadings and affidavit hereto attached and marked Exhibit A and Exhibit B show that the defendant is entitled to a judgment as a matter of law.

Dated at Anchorage, Alaska, the 11th day of April, 1956.

/s/ LYNN W. KIRKLAND,  
Attorney for the Defendant,  
City of Anchorage.

[Title of District Court and Cause.]

### AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

United States of America,  
Territory of Alaska—ss.

I, B. W. Boeke, being first duly sworn, depose and say:

That I am the City Clerk for the City of Anchorage, Alaska, and have held said position for a

period of nine years; that I have personal knowledge of the facts herein set forth; that this affidavit is submitted in support of defendant's Motion for Summary Judgment herein for the purpose of showing that there is in this action no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law; that I am over the age of 21 years and am competent to be a witness in this cause.

That as a part of my duties as City Clerk for the City of Anchorage, Alaska, I am the keeper of the records and documents, including the records of the City Council meetings; that after a diligent search I am unable to find any record in the minutes of the City Council meetings whereby the City Council has agreed to pay the plaintiffs as alleged in their complaint; nor is there any record in the minutes of the City Council meetings or in any other document on file in the City Clerk's office whereby the Mayor or City Manager has signed any agreement to pay as alleged in the plaintiff's complaint; nor is there any record that the City Clerk has attested any document which obligates the City to pay as set forth in the plaintiffs' complaint to this cause; nor is there any record that any agreement as alleged in the plaintiffs' complaint has been approved as to substance by the City Manager and approved as to form by the City Attorney; nor is there any record in the minutes of the City Council meetings whereby a vote has been taken by the City Council obligating the City to pay money to the plaintiffs as stated in the complaint to this cause.

Further affiant sayeth not.

/s/ B. W. BOEKE.

Subscribed and sworn to before me this 17th day of April, 1956.

[Seal] /s/ ERNEST P. LaBATE,  
Notary Public in and for  
Alaska.

My commission expires: 5/18/57.

Receipt of copy acknowledged.

[Endorsed]: Filed April 19, 1956.

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[Title of District Court and Cause.]

OBJECTION TO MOTION FOR  
SUMMARY JUDGMENT

Come now the Plaintiffs above named, and object to the Court rendering judgment on the Motion filed herein, and support this objection with two affidavits—one of Burton E. Carr, and the other of Don Rozell.

Dated at Anchorage, Alaska, this 20th day of April, 1956.

BELL, SANDERS & TALLMAN,

By /s/ BAILEY E. BELL,  
Of Attorneys for the  
Plaintiffs.

[Title of District Court and Cause.]

### AFFIDAVIT

United States of America,  
Territory of Alaska—ss.

Burton E. Carr, being first duly sworn on oath, deposes and says that he has read the affidavit of B. W. Boeke, filed herein, and that this affiant very well remembers the day in the council meeting when the matters involved in this lawsuit were discussed; that Mr. Boeke was present there and that the mayor and council were present and that the senior Mr. Cuddy was there, representing this affiant; that a full and complete discussion was had with reference to the matters involved in this suit and it was on or about the 15th day of May, 1950.

The council and city officials wanted this affiant to cut off the front part of his basement, on which he was endeavoring to build a building and to set the building back ten feet, and the cost of doing this was discussed. It was agreed between the city council, while it was duly assembled, and this affiant, that he would cut the front part of his basement off and extend the building back further and that the city agreed to pay the cost of cutting this foundation off and this Plaintiff accepted the agreement and promised to, and did, cause his basement to be cut off and moved back, and was required to pay \$2,542.00 to a contractor by the name of Victor Gottberg and was then required to pay for extra work and material, which made a total cost of \$4,051.48. This





as a councilman, in a meeting in which Burton E. Carr and his attorney, Warren Cuddy, appeared before the council and a discussion took place, whereby the city wanted to have Burton E. Carr set his building, that was then ready for construction, back further south of the line, so that 5th Avenue could be widened; that the foundation for the building was then constructed and was too close to the street to allow for the widening that the city was then in the process of doing.

After considerable discussion, it was agreed that if Burton E. Carr and his wife would cut the foundation off in front and set it back ten feet, that the city would pay the cost of moving his foundation back that far; that he understood that a bid was going to be procured and has since heard that it was procured and that it was the honest intention of the council at that time to pay Burton E. Carr the cost of moving his building back and that there was no discussion in the meeting there, apparently the Mayor and all of the council concurred.

/s/ DONALD ROZELL.

Subscribed & Sworn to before me this 20th day of April, 1956.

[Seal]     /s/ BAILEY E. BELL,  
Notary Public in and for  
Alaska.

My commission expires: 1-28-57.

Receipt of copy acknowledged.

[Endorsed]: Filed April 20, 1956.

[Title of District Court and Cause.]

M. O. GRANTING MOTION FOR  
SUMMARY JUDGMENT

Now, at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to wit:

Now, at this time upon the Court's motion,

It Is Ordered that defendant's motion for summary judgment in cause No. A-11,887, entitled Burton E. Carr and Marie A. Carr, Plaintiff's, versus City of Anchorage, a Municipal Corporation, Defendant, be, and it is hereby, granted.

Entered June 8, 1956.

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In the District Court for the Territory of Alaska,  
Third Division

No. A-11,887

BURTON E. CARR and MARIE A. CARR,  
Plaintiffs,

vs.

CITY OF ANCHORAGE, a Municipal Corporation,  
Defendant.

SUMMARY JUDGMENT

The motion of the defendant for summary judgment pursuant to Rule 56(c) of the Rules of Civil



Procedure, having been presented, and the court being fully advised,

The court finds that the defendant is entitled to a summary judgment as a matter of law.

It is therefore ordered, adjudged and decreed that the defendant's motion for summary judgment be, and the same hereby is granted, that the plaintiffs have and recover nothing by their suit, that the defendant, City of Anchorage, go hence without delay, and that defendant recover the sum of None Dollars, its costs and fees in this behalf expended and have execution therefor.

Enter:

Dated at Anchorage, Alaska, this 16th day of July, 1956.

/s/ J. L. McCARREY, JR.,  
Judge.

[Endorsed]: Filed and entered July 16, 1956.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Burton E. Carr and Marie A. Carr, Plaintiffs, hereby appeal to the United States Court of Appeals for the Ninth Cir-

cuit from the final judgment entered in this action on the 16th day of July, 1956.

BELL, SANDERS & TALLMAN,

By /s/ JAMES K. TALLMAN,  
Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed July 16, 1956.

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[Title of District Court and Cause.]

### SPECIFICATIONS OF ERROR

#### I.

The Court erred in granting the Motion for Summary Judgment which was filed July 16, 1956, for the reason that the Complaint and Supporting Affidavit did state a cause of action in favor of the Plaintiff and against the Defendant, City of Anchorage, a municipal corporation.

Dated at Anchorage, Alaska, this 17th day of August, 1956.

BELL, SANDERS & TALLMAN,

By /s/ JAMES K. TALLMAN.

Receipt of copy acknowledged.

[Endorsed]: Filed August 17, 1956.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE  
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled Court, do hereby certify that pursuant to Rule 10(1) of the rules of the United States Court of Appeals, Ninth Circuit, and of Rules 75(g) and 75(o) of the Federal Rules of Civil Procedure, and of the designation of counsel for plaintiffs, I am transmitting herewith the Original Papers in my office dealing with the above-entitled action, including, though not designated, plaintiffs' specifications of error and designation of record.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, from the judgment filed and entered in the above-entitled action by the above-entitled Court on July 16, 1956.

Dated at Anchorage, Alaska, this 20th day of August, 1956.

[Seal]      /s/ WM. A. HILTON,

Clerk.

[Endorsed]: No. 15236. United States Court of Appeals for the Ninth Circuit. Burton E. Carr and Marie A. Carr, Appellants, vs. City of Anchorage, a Corporation, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed August 22, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.